Filed 12/10/08 P. v. Marshall CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO MARSHALL, Defendant and Appellant.	B200460 (Los Angeles County Super. Ct. No. BA315773)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed as modified.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Antonio Marshall was charged with possessing cocaine base and marijuana, both for the purpose of sale. The jury, however, convicted him of the lesser offenses of simple possession of cocaine base (Health. & Saf. Code, § 11350, subd. (a)) and possession of not more than 28.5 grams of marijuana (Health. & Saf. Code, § 11357, subd. (b)), a misdemeanor. Defendant waived the right to a jury trial on the recidivist allegations and admitted suffering a prior conviction under the three strikes law for residential burglary (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and two prior prison terms (Pen. Code, § 667.5, subd. (b)) for residential burglary and receiving stolen property. The trial court granted defendant's *Romero*[1] motion as to the strike and dismissed one of the prior prison term enhancements in the interest of justice. It imposed a four-year prison term consisting of the upper term of three years for the cocaine possession offense, plus the one year prison term enhancement. A suspended fine was imposed for the misdemeanor offense.

In his timely appeal, defendant contends the admission of testimony the police had received an anonymous tip that defendant was selling drugs resulted in a miscarriage of justice. He also requests that we conduct an independent review of the sealed portion of the record pertaining to discovery of police personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) to determine whether the trial court erroneously withheld discoverable information from the defense. The Attorney General contends the judgment must he modified to reflect the imposition of various mandatory fines and fees.

We modify the judgment to reflect the additional mandatory fees that must be imposed, but affirm the judgment in all other respects.

---

1 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

STATEMENT OF FACTS

In the late morning of January 17, 2007, Officer Julius Resnick and seven other officers were conducting a narcotics investigation at the Olympic Hotel on South Westlake Avenue in Los Angeles. Officer Phillip Chan informed Officer Resnick that defendant "was selling narcotics out of the hotel there."[2] Officer Resnick saw defendant and a woman, Deana Anthony, running away from other officers. He chased the couple and detained defendant approximately two hundred yards from the hotel. The officer searched defendant, recovering a key attached to a plastic holder with "Room 105" written on it.

Officer Resnick used the key to open the door to Room 105. It was a very small room in a state of disarray with bags of clothing strewn about the room. The officer found a rent receipt for Room 105 in the name of "Marshall/Anthony" next to the medicine cabinet. Inside a laundry bag containing women's undergarments, he found a man's sock that was suspiciously heavy. Turning the sock inside out, he discovered three or four pieces of an off-white substance resembling rock cocaine, weighing approximately two ounces (69 grams). Criminalist Jeffrey Lowe testified that the substance contained cocaine base.

Defendant had $290 in the rear pocket of his pants. Around defendant's neck was a red key chain holding a single key, which fit a "maroonish brown" Cadillac that was parked nearby. In the center console were five small plastic baggies filled with a leafy substance resembling marijuana, which weighed approximately 4.5 grams. There was

---

[2] The trial court instructed the jury that Officer Chan's statement was not to be considered for its truth—that defendant possessed or was selling narcotics out of the hotel—but only to explain why the officers were investigating defendant. More specifically, "oftentimes tips that are given to the police prove to be untrue, so you cannot put reliance on that information as evidence of the defendant having committed a crime on this particular date in question." Each juror stated that he or she understood and would follow the court's limiting instruction.

$20 in the ashtray. Deana Anthony had $443 in cash inside the purse she carried. Another $400 was recovered from a woman's jacket or shirt found in the apartment's closet.

Officer Chan also took part in the search of Room 105. He recovered a small electronic, digital scale. On the bed, underneath some clothing, he found 13 plastic baggies containing approximately 12.3 grams of a substance resembling marijuana. He also recovered $12 from a perfume box next to the scale. Criminalist Lowe testified the leafy substances contained marijuana. Officer Chan saw no drug paraphernalia and nothing to indicate that drugs had been used in the apartment. There was a total of $1,165 in currency recovered, all in denominations of $20 bills or smaller.

After defendant's arrest, Officer Chan advised defendant of his *Miranda* rights. Defendant said he understood those rights and agreed to waive them. Without specifying the kind, amount, or specific location, the officer told defendant that "some dope" was found in his room. Defendant referred to the rock cocaine in a sock and the marijuana, and took full responsibility for those items, saying that Deana Anthony had nothing to do with the drug sales. He admitted to typically purchasing two ounces of rock cocaine and then selling it in front of the hotel between 7:00 and 9:00 a.m. and again between 10:00 p.m. and 2:00 a.m.

Desk clerk Thomas Jenkins testified that many hotel guests stayed at the hotel for extended periods of time. Defendant was a resident there, staying with Deana Anthony. They first stayed in Room 207. On January 17, 2007, Jenkins allowed them to move to Room 105 on her request for a room with a bathtub. He gave her the new room key that morning. Defendant and Deana Anthony made the room change between 8:00 and 10:00 a.m. The two were renting on a weekly basis.

From his extensive experience in drug-related investigations, Officer Resnick testified that the Olympic Hotel was known by the police "for the blatant sales of narcotics, specifically rock cocaine." Many such arrests had been made there. Testifying as a narcotics expert, Officer Chan opined that defendant possessed the cocaine and

marijuana for the purpose of sales. Among the factors supporting that opinion was the location of the contraband in an area notorious for drugs, the presence of a scale, the quantity of drugs, the lack of any paraphernalia for smoking cocaine, the individualized packaging of similar small amounts of marijuana in plastic bags, and the presence of a large amount of cash in smaller denominations. Together with defendant's admissions, this evidence supported the experience-based inference that defendant was selling, rather than personally using, cocaine and marijuana.

The defense called a single witness, the twin sister of Deana Anthony, Quiana Anthony. The maroon Cadillac belonged to her. She received it from defendant in early July 2007. The title transfer, however, had not been completed because she failed to get the required smog check. Instead of taking possession of the car at that time, she gave the keys to Deana Anthony and let her sister use it while she travelled to Las Vegas on business. Upon her return to Los Angeles on approximately July 17, she regained possession from her sister; however, the car had been impounded by the police. There were no illegal substances in the Cadillac at the time Quiana Anthony lent it to her sister.

DISCUSSION

Evidentiary Claim

Defendant contends the trial court committed prejudicial error in admitting, over defendant's objection, testimony that the police arrived at the Olympic Hotel in response to an anonymous tip that defendant was selling cocaine at that location. Our review discloses no error and no reasonable likelihood of prejudice. The trial court admitted the evidence for a legitimate nonhearsay purpose, carefully instructing the jury that the evidence could not be considered to prove defendant possessed or sold the contraband.

At a hearing before the presentation of any evidence, the parties disputed the extent to which the prosecution could adduce evidence as to the circumstances of the

room search and its legality (it was done pursuant to defendant's parole conditions). The trial court suggested that to avoid admission of evidence that defendant was on parole, the prosecution be permitted to explain the officers' presence at the hotel by showing they received information causing them to investigate defendant. The defense objected to that approach on the ground that the information would be hearsay. The court disagreed, pointing out the informative statement would not be admitted for its truth, but only to explain the officers' presence at the scene,[3] which would be something the jurors would likely "wonder about." The defense objected, arguing under Evidence Code section 352 that there was a danger the jury would consider the statement as substantive evidence of guilt. Alternatively, the defense requested a limiting instruction, which the court agreed to give. The officers would be permitted to testify they were there to investigate a tip that defendant was selling narcotics from that location, but the court would instruct the jury that the testimony could be considered only to explain why the officers were at the location and not to consider it as evidence that defendant committed the charged offenses.

Officer Resnick testified that he was present at the Olympic Hotel because he and the other officers "were conducting a narcotics investigation." When he explained further that Officer Chan told him they were investigating defendant, "who was selling narcotics out of the hotel there," the defense objected. The court instructed the jury that Officer Resnick's testimony about what he heard from Officer Chan concerning defendant selling narcotics was admissible only "to explain why the officers were investigating the defendant. It is not being introduced to prove that the defendant sold drugs or possessed either the cocaine or marijuana on the date in question." The court elaborated and cautioned the jurors not to place any reliance on the testimony in assessing whether defendant committed a crime "[b]ecause oftentimes tips that are given

---

[3] "To be hearsay, a statement must be 'offered to prove the truth of the matter stated.'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140, quoting Evid. Code, § 1200, subd. (a).)

to the police prove to be untrue." The court polled each juror to ensure he or she "understood the limiting effect of the statement"—that it could be considered only to explain "why the officers were there." All the jurors and alternates answered affirmatively.

"On appeal, we apply an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) A trial court's determination under Evidence Code section 352 will not be disturbed on appeal absent a clear showing of abuse of discretion. (*People v. Siripongs* (1988) 45 Cal.3d 548, 574; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1610.)

Defendant asserts the probative value of the challenged statement was "nil" because, as a general matter, "the means by which a particular person comes to be suspected of a crime—the reason law enforcement's investigation focuses on him—is irrelevant to the issue to be decided at trial, i.e., that person's guilt or innocence, except insofar as it provides *independent* evidence of guilt or innocence." (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1150.) That assertion, however, overlooks the fact that the trial court clearly and unambiguously instructed the jury the evidence must not be considered for the purpose of determining whether defendant committed crimes on the date in question, but only as background information that explained the police presence at the scene. That distinction made perfect sense and would have been easy to apply.

As is well established, "'[It is] the almost invariable assumption of the law that jurors follow their instructions.' [Citation.] '[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions

in a criminal case and strive to understand, make sense of, and follow the instructions given them.' [Citations.]" (*United States v. Olano* (1993) 507 U.S. 725, 740.) There is nothing in the record to suggest the jury did otherwise here. Not only were the jurors specifically polled to ensure they understood and would apply the limiting instruction, but the jury rejected the most potentially prejudicial inference that might be drawn from the challenged testimony—that defendant possessed the contraband with the intent to sell.

Defendant points to the fact that during deliberations, the jury had initially sought the trial court's guidance on a number of questions pertaining to defendant's confession. Before the court could respond, the jury informed the court that no help was necessary after all. Before taking the verdicts, the court questioned the jury carefully to ensure that, in fact, the jurors resolved their questions without any need for judicial intervention. The foreperson affirmed that was the case, and each juror agreed.

It is thus apparent that the challenged testimony had no direct bearing on the subject of the jurors' initial inquiries, and, more importantly, the trial court established the jurors needed no assistance in resolving those inquiries. Accordingly, there is nothing indicative of potential prejudice. "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Here, the challenged statement was admissible for a legitimate, nonhearsay purpose and the court's limiting instruction eliminated all reasonable potential for prejudice.

It follows there was no miscarriage of justice.[4] A miscarriage of justice results under California law "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1480, fn. 4.) The evidence that defendant possessed the contraband was very strong and supported by defendant's admissions—there was no reasonable likelihood the jury would have applied the challenged testimony to find him guilty of the possessory crimes for which he was convicted.

***Pitchess* Motion**

In response to defendant's pretrial *Pitchess* motion, the trial court conducted an in camera review of documents from personnel files of Officer Chan and another officer involved in defendants' arrest. The court ordered disclosure to the defense of a civilian complaint pertaining to both officers, along with the complainant's last known address. Defendant requests this court to conduct an independent review of the sealed portion of the record pertaining to discovery of those personnel records to insure all discoverable materials were produced to the defense.

Pursuant to that request, we must determine whether the trial court abused its discretion and erroneously withheld discoverable information from the defense. In *Pitchess*, the California Supreme Court held that a criminal defendant is entitled to discovery of officer personnel records if the information contained in the records is

---

[4] "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

relevant to his ability to defend against the charge. Later enacted legislation implementing the court's rule permitting discovery (Pen. Code, §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043-1047) balanced the accused's need for disclosure of relevant information against a law enforcement officer's legitimate expectation of privacy in his or her personnel records. The Legislature concluded that a defendant, by written motion, may obtain information contained in a police officer's personnel records if it is material to the facts of the case. (Evid. Code, § 1043, subd. (b)(3).) When presented with such a motion, the court rules as to whether there is good cause for disclosure. (*Id.*, §§ 1043, 1045.) If the court orders disclosure, the custodian of the officer's records brings to court all the potentially relevant personnel records and, in camera, the court determines whether any of the records are to be disclosed to the defense. "A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion." (*People v. Hughes* (2002) 27 Cal.4th 287, 330; see also *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Gill* (1997) 60 Cal.App.4th 743, 749.)

We have reviewed all material in the record regarding defendant's *Pitchess* motion, including the moving papers, the sealed transcripts of the *in camera* proceedings, and the sealed personnel records considered by the trial court.[5] Those records afford us with an adequate record to conduct our independent review. That review reveals no abuse of discretion. (*People v. Myers* (2007) 148 Cal.App.4th 546, 553, citing *People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

---

[5] In response to an order by this court, the trial court provided us with the sealed personnel records.

Penalty Assessments

On September 25, 2007, we requested the parties brief the effect of *People v. Chavez* (2007) 149 Cal.App.4th 1340 on the restitution and court security fines imposed in this case. *Chavez* considers the effects of Penal Code section 1465.7 and Government Code section 70372 on fines imposed in criminal cases. On August 15, 2007, the California Supreme Court granted review in *Chavez* (S153920).[6] On October 5, 2007, the Governor approved Senate Bill No. 425, which was enacted to clarify the state construction penalty is not to be imposed on restitution fines. (Assem. Com. on Public Safety, 3d reading analysis of Sen. Bill No. 425 (2007–2008 Reg. Sess.) as amended Aug. 27, 2007, p. 1; Assem. Com. on Public Safety, 3d reading analysis of Sen. Bill No. 425 (2007–2008 Reg. Sess.) as amended Sept. 6, 2007, p. 1; Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 425 (2007–2008 Reg. Sess.) as amended Sept. 6, 2007, pp. 4–5; Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 425 (2007–2008 Reg. Sess.) as amended Sept. 6, 2007, pp. 4–5.) Section 22 of Legislative Counsel's Digest for Senate Bill No. 425 states it was enacted in part to "construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *People v. Chavez* (2007) 150 Cal.App.4th 1288." Senate Bill No. 425 operates retroactively. (*People v. McCoy* (2007) 156 Cal.App.4th 1246, 1256-1257; *In re Estrada* (1965) 63 Cal.2d 740, 748.)

At sentencing, the trial court imposed a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a $200 parole revocation fine (Pen. Code, § 1202.45), which was stayed pending successful completion of parole. It also imposed a court security fee of $20 (Pen. Code, § 1465.8, subd. (a)(1) and a laboratory analysis fee of $50 (Health & Saf. Code, § 11372.5). On the one hand, no state construction penalty could be assessed

---

6 The California Supreme Court dismissed review and remanded the case to this court on October 24, 2007.

against defendant's restitution fines. However, on the other hand, respondent contends, defendant concedes, and we agree that the trial court erred in failing to impose a second $20 security fee pursuant to Penal Code section 1465.8, subdivision (a)(1), for the count 2 conviction. A $20 fine must "be imposed on every conviction for a criminal offense." (Pen. Code, § 1465.8, subd. (a)(1); see *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866; *People v. Crittle* (2007) 154 Cal.App.4th 368, 370-371 [court security fee is imposed even if punishment is stayed on the conviction].) Similarly, the $50 laboratory analysis fee was subject to the state construction penalty assessment, requiring imposition of a $35 construction penalty. (*People v. Taylor* (2004) 118 Cal.App.4th 454, 456; see Gov. Code, § 76000 [assessment of additional penalty of $7 for every $10 in fines, penalties, or forfeitures for all criminal offenses].) Additionally, Penal Code section 1465.7, subdivision (a), required that a "state surcharge of 20 percent shall be levied on the base fine used to calculate the state penalty assessment," which applied to the $50 laboratory fee and mandated an additional charge of $20. (*People v. Taylor*, *supra,* at pp. 456-460.)

DISPOSITION

A $20 court security fee is imposed on count 2, pursuant to section 1465.8, subdivision (a)(1). In addition, a $35 construction penalty is imposed pursuant to Government Code section 76000, along with a 20 percent state surcharge of $10 pursuant to Penal Code section 1465.7. The clerk of the superior court is instructed to prepare an

amended abstract of judgment reflecting these changes and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.